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No. 95-1845

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THURGOOD MARSHALL LEGAL SOCIETY AND
BLACK PRE-LAW ASSOCIATION,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1300 19th Street, N.W.
Suite 260
Washington, D.C. 20036
(202) 833-8400

Counsel for Respondents Hopwood and Carvell

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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QUESTIONS PRESENTED

1. Does the petition for certiorari, filed on May 13, 1996, give this Court jurisdiction over the judgment of the Fifth Circuit dated May 11, 1994 affirming the final judgment of the District Court dated January 24, 1994?

2. Did the Fifth Circuit correctly apply the "law of the case" doctrine in its judgment dated March 18, 1996?

3. Did the courts below correctly decide that petitioners did not show that their interests were "inadequately represented" (one of the four required elements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure) or can a finding of "inadequate representation" be predicated solely upon the fact that a party has not used every argument and every piece of evidence that a would-be intervenor believes could be used?

4. Could the courts below have reached the same result, denying petitioners intervention, by relying upon any of the other three required elements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure?

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BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

Respondents Cheryl J. Hopwood and Douglas W. Carvell (hereinafter "plaintiffs") respectfully submit this brief in opposition to the petition for a writ of certiorari by the Thurgood Marshall Legal Society ("TMLS") and the Black Pre-Law Association ("BPLA"). (The petition lists the other respondents. Pet. iii.)

INTRODUCTION

Petitioners are would-be intervenors, whose belated and flawed efforts to intervene were repeatedly rejected by the courts below. The petition presents a question of federal civil procedure: whether petitioners properly could intervene pursuant to Rule 24(a), Fed. R. Civ. P., in a pending lawsuit. A vast array of judges repeatedly and consistently have decided that question against petitioners in the courts below. Not easily discouraged, petitioners now ask this Court to grant certiorari in order to review the lower courts' initial application of Rule 24(a) and the subsequent application of the "law of the case" doctrine. They apparently seek a judgment from this Court reversing the unanimous decisions of the lower courts denying intervention, and ordering such intervention as well as discovery and a new trial of the underlying lawsuit.[1]

This Court should not exercise its discretionary certiorari jurisdiction to review such limited and fact-bound issues. In any event, the courts below correctly addressed these questions.

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[1] Even this is not altogether clear. Petitioners assert that this Court "should grant certiorari on both the merits petition and this petition to assure that in reaching *its* decisions . . ., *the Court* has the benefit of the full presentation of relevant evidence . . . " (Pet. 24-25, emphasis added). *See also* Pet. 9-10 n.4 (merits appeal should include petitioners). They apparently want either to intervene for the first time *at the Supreme Court level* and/or to present their evidence concerning the Texas Index, rejected in the lower courts and never subjected to discovery or cross-examination, to this Court. This would be, to say the least, unusual.

STATEMENT OF THE CASE

Petitioners' description of the proceedings in the courts below omits crucial facts, and misrepresents others.

A. Pre-Trial Proceedings

The underlying lawsuit in which petitioners sought intervention began in September 1992 with the filing of a complaint by plaintiff Hopwood and another individual who subsequently voluntarily dismissed her claim. In April 1993, another group of plaintiffs, including plaintiff Carvell, filed a second complaint. (Several of the plaintiffs named in this second complaint also voluntarily dismissed their lawsuit.) In both complaints, the named defendants were the State of Texas and the Regents of the University of Texas System. The complaints alleged that the defendants administered a racially discriminatory admissions program at the University of Texas Law School ("UT Law School") in violation of plaintiffs' rights under the Fourteenth Amendment to the United States Constitution and various statutes.

In November 1992, the district court initially set a scheduling order fixing a March 16, 1993 discovery deadline for Hopwood's action. R. 27-29. The court subsequently extended that deadline. Contrary to the impression left by petitioners (Pet. 3), there was no distinct "bifurcation" of discovery on issues like standing and ripeness, and discovery on the "merits." Indeed, as the district court's October 1993 order denying defendants' summary judgment motion on these issues (R. 588-605) demonstrates, the standing and ripeness issues directly involved the details of UT Law School's admissions procedures. Indeed, the district court's decision in

October 1993 reflects the extensive discovery that had been taken with respect to those procedures.

The district court denied all of defendants' summary judgment motions in its October 1993 order, and discovery continued. Contrary to petitioners' representations to this Court (Pet. 3), the district court did not first "authorize[] the beginning of merits discovery" on November 17, 1993. Rather, in that order, it set various deadlines and scheduled a pre-trial conference for March 4, 1994. "Merits" discovery already had begun, and was ongoing.[2]

In February 1994, subsequent to petitioners' first motion for intervention, plaintiffs filed a consolidated, amended complaint. In that complaint, plaintiffs named the University of Texas, UT Law School, and various officials of each as additional defendants.

B. Petitioners' First Motion To Intervene And First Appeal

Petitioners first moved to intervene, pursuant to both Rule 24(a) and Rule 24(b), Fed. R. Civ. P., on January 5, 1994, more than 15 months after the commencement of the action, some 10 weeks after the district court's denial of defendants' summary judgment motions, and only about 12 weeks before the scheduled

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[2] The district court also decided various outstanding discovery motions in its November 17 order, including a motion filed *before* the district court's October 1993 order, seeking answers to interrogatories concerning recruitment efforts and scholarship programs for minorities by UT Law School. Thus, the November 17 order further evinces the ongoing process of "substantive" discovery.

end of discovery. Petitioners argued, *inter alia*, that the State of Texas had not protected the rights of African-Americans in the past. (For its part, the State denied that it had anything to do with the admissions program at UT Law School.)[3] On the first motion to intervene "[p]etitioners also made clear their intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device" (Pet. 26). (The Texas Index ("TI") is a composite blend of undergraduate GPA and LSAT scores used by UT Law School in the admissions process. App. 3a-4a & n.1.)

In a decision and order dated January 19, 1994 (App. 190a-195a), the district court denied petitioners' motion to intervene. The district court first noted the belatedness of the motion. App. 191a ("Now, with only a little over two months to go before the completion of discovery, which has already been a contentious process and evidently involves a multitude of documents, two new entities wish to become parties to the litigation"). Then, considering first the motion to intervene as of right, the district court identified the four requirements of Rule

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[3] One of the issues raised by defendants in their motion for summary judgment filed in August 1993 was that plaintiffs had named the wrong defendants. More specifically, the named defendants, the State of Texas and the Board of Regents, argued that they "ha[d] no operational or policy control over the admission practices of the School of Law." D-447, Dfs. Memo. In Support of SJ Mot., p. 33. *See also* D-337 (declaration of dean of UT Law School stating under oath that "[t]he actual mechanics of our admissions policies, including its goals of minority recruitment and diversity in the incoming class, are the province of the admissions committee and myself exclusively. There are no directives, instructions, orders or any other form of commands from the State, the Board of Regents, or the University as a whole that govern the admissions process").

24(a): (1) a timely motion, (2) by a movant with an interest in the underlying lawsuit, (3) that might be impaired by the disposition of the lawsuit, and (4) an inadequate representation of that interest by the existing parties to the litigation. App. 192a.

Although movants have the burden of showing that they can meet all four requirements,[4] the district court found that it needed to consider only one, "inadequate representation." The Court noted that "as a practical matter, [petitioners] and the Defendants have the same ultimate objective in this lawsuit -- the preservation of the [current] admissions policy" (App. 192a). While recognizing that the presumption of adequate representation can be rebutted "on a relatively minimal showing" (App. 193a), the district court held that petitioners had not met even this slight burden because they had provided nothing more than mere allegations that the State defendants would not adequately represent their interests. In holding that such allegations were insufficient, the Court also expressed concern for the "obstruction and delay that may be caused by allowing intervention" in the case (App. 193a).

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[4] *E.g.*, *Doe v. Duncanville Independent School Dist.*, 994 F.2d 160, 168 (5th Cir. 1993) ("all four . . . factors [must] be present before a party may be entitled to intervention as of right"); *Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992) ("An 'applicant who fails to meet any one of these requirements cannot intervene'"); *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992) (same); *United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991) (burden of proof on movant). *See generally* 7C Wright, Miller & Kane, *Federal Practice And Procedure*, § 1908 at 262 (1986) (requirements are a timely application, an interest in the subject matter, a potential for impairment of that interest, and inadequate representation).

The district court also rejected the petitioners' application pursuant to Rule 24(b), finding that "adding the prospective intervenors as defendants at this juncture would needlessly increase cost and delay disposition of the litigation" (App. 194a).[5]

Since the district court's order was a final judgment for petitioners, they were able to (and did) immediately appeal. The Court of Appeals accommodated petitioners' request that their appeal be heard quickly, and granted their motion to expedite the appeal.

While the appeal was pending, the parties' discovery continued, and was completed, in the district court. Pursuant to the district court's scheduling order, the parties exchanged their final expert lists, identifying each of their experts and their proposed testimony, in mid-April. R. 1022, 1024-28. Although neither petitioners' proposed expert nor any other expert who would challenge the validity of the Texas Index appeared on defendants' expert list, petitioners did not ask the district court to reconsider their application to intervene and did not seek to supplement the record in the Court of Appeals.[6] Petitioners' suggestion that they moved to present their evidence "*[a]s soon* as it became clear" that the defendants

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[5] Although "undue delay" and "prejudice to the parties" are additional considerations identified in the last sentence of Rule 24(b), they are also factors in a "timeliness" analysis -- indeed, "prejudice to the parties" is the most important factor. *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970).

[6] The Fifth Circuit maintains a procedure for moving to amend a final judgment pursuant to Rule 60(b) while an appeal is pending from that judgment. *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976).

would not do so (Pet. 22 (emphasis added); *see also* Pet. 7) is just wrong.

The Court of Appeals affirmed the district court's judgment denying intervention in an opinion and judgment dated May 11, 1994. App. 98a. With respect to petitioners' motion to intervene "as of right" under Rule 24(a), the Court of Appeals held that where the party whose representation is said to be inadequate is a governmental entity, a movant seeking intervention had to make "a much stronger showing of inadequacy" (App. 97a (citing Wright & Miller, *Federal Practice and Procedure*, § 1909 (1986)). The Court held that, under such circumstances, a proposed intervenor had to "demonstrate that its interest is in fact different from that of the state" (App. 98a). While explicitly recognizing petitioners' argument that the State was "not in as good a position to bring in evidence of . . . *current* discrimination" (App. 98a (emphasis added)), the Court of Appeals held that petitioners had not "met their burden of demonstrating that they have a separate *interest* that the State will not adequately represent" (App. 98a-99a (emphasis added)). The Court also held that the district court's finding that intervention would needlessly increase costs and delay disposition of the lawsuit was not an abuse of discretion, and, accordingly, affirmed the denial of petitioners' motion for permissive intervention.

Petitioners did not seek rehearing or rehearing en banc, and did not file a petition for certiorari with this Court within the time prescribed by 28 U.S.C. § 2101(c).

C. Trial And Post-Trial

A bench trial was held before the district court on

May 16-20, 1994 and May 23-25, 1994. Again, although the lists of witnesses from both sides were available long before trial, and petitioners thus knew who would be called, and what they would testify to, they never moved before or during trial for reconsideration of the denial of their motion to intervene on the ground that defendants were not presenting evidence attacking the validity of the Texas Index.

Contrary to petitioners' concerns, defendants vigorously defended their 1992 admissions system by, *inter alia*, arguing that it was a narrowly-tailored means of remedying the present effects of past discrimination against African Americans and Mexican Americans by UT Law School, the system of higher education as a whole, and local school districts in the State of Texas. (Indeed, petitioners' "Statement Of Facts" relies heavily on those parts of defendants' evidence cited in the district court's opinion. Pet. 9-15.)

Defendants' expert witnesses went to great lengths to detail the history of discrimination in Texas. Thus, for example, one of defendants' experts gave a long history of slavery in Texas, racial violence in Texas from the Civil War to the early 20th century, black education in roughly the same time period, Heman Sweatt's efforts to enter UT Law School in the late 1940's and early 1950's, and miscellaneous discriminatory incidents in Texas in the 1950's and 1960's (Trial Tr. Vol. 19, pp. 9-30; Trial Exs. D-476 to D-480). The defendants also called a number of student witnesses, including a member of petitioner TMLS (Trial Tr. Vol. 14, p. 31), who described their view of the reputation of UT Law School and what they believed were acts which led to an uncomfortable or hostile "racial atmosphere" on campus.

Post-trial briefs were due on June 13, 1994. Petitioners, who had been granted amici status by the district court (Pet. 5), were permitted to submit a brief. In flagrant violation of Rule 43(a), Fed. R. Civ. P., which mandates that "testimony of witnesses shall be taken orally in open court," petitioners took this opportunity to submit, in addition to a brief, the declaration of their expert. Pet. 6. Their brief conceded that the "psychometric analysis" performed by their expert is "a complex and technical area" (R. 1255 n.6), and indicated that their expert was "readily available to the Court and to the parties should the Court desire further elaboration of his declaration testimony" (*id.*). They explained that they had offered their expert to the defendants as a witness, but that the defendants had "declined the offer" (*id.*). Pet. 5-6.

Plaintiffs immediately moved to strike the declaration of petitioners' expert (and other non-record exhibits that had been submitted by petitioners). The district court denied that motion in an order dated June 22, 1994 but held that "to the extent amici has [sic] presented new issues and evidence not presented at trial in its brief and exhibits, the Court will not consider such evidence, which is outside the record for any purpose." R. 1450.

In August 1994, the district court issued a decision (App. 101a-186a) declaring the admissions system used by UT Law School in 1992 unconstitutional, but refusing to award any significant relief to plaintiffs. Plaintiffs appealed the subsequent final judgment (186a-87a) to the Court of Appeals.

D. Petitioners' Second Motion And Second Appeal

On July 12, 1994, six weeks after the trial, the petitioners renewed their prior motion to intervene. In this motion, the petitioners sought intervention "for the limited purpose of introducing [their expert's psychometric] evidence and allowing plaintiffs to cross-examine their expert and offer any independent evidence of their own on the issue of the validity of the Texas Index" (R. 1454-55). The petitioners also sought a "limited opportunity for discovery" to obtain certain data (R. 1455 n.5). Only a few days after petitioners made their motion to renew, the district court summarily denied the motion. App. 188a-89a.

Petitioners appealed this second denial to the Court of Appeals. Shortly thereafter, they separately moved to intervene in the Court of Appeals in plaintiffs' appeal of the district court's final judgment on the merits. In an order entered on November 14, 1994, the Court of Appeals denied that motion.

Petitioners' second appeal was eventually consolidated with plaintiffs' appeal of the final judgment on the merits. On March 18, 1996, the Court of Appeals issued an opinion deciding both appeals. On the merits appeal, the Court held, *inter alia*, that the district court had understated the scope of the constitutional violation and improperly had imposed certain burdens on the plaintiffs in assessing damages. (The defendants in the underlying action have filed a separate petition for writ of certiorari seeking review of that part of the judgment. Sup. Ct. No. 95-1773.)

On petitioners' second appeal, the Court of Appeals unanimously dismissed for want of jurisdiction. App. 69a-76a; 89a n.25. The Court of Appeals repeatedly noted that the petitioners had presented in their previous appeal the argument that the State defendants would not present a "test invalidity" defense, and that the prior panel had rejected that argument. App. 70a ("The [prior] panel implicitly considered and rejected . . . a defense based upon the use of TI scores under title VI, as the [petitioners] argued that possibility as one basis for intervention"); App. 73a-74a ("There is no question that the *Hopwood I* panel addressed the intervention as a matter of right *de novo*, on the merits, including the potential that the law school would not raise every defense proposed by the [petitioners]"); App. 76a ("Here, the record shows that the [petitioners] raised this same title VI argument before the *Hopwood I* panel in both their brief and at oral argument").[7] The Court rejected petitioners' contention that the failure of the defendants at trial to present the test-invalidity "defense" constituted any sort of changed circumstance that could justify reconsideration of the prior panel's decision. App. 73a n.59. The Court also noted that the Title VI issue had not been litigated in the underlying lawsuit, and that nothing in its decision, or in the underlying lawsuit as a whole, would preclude petitioners from commencing an action based upon the alleged invalidity of UT Law School's admissions criterion. App. 76a n.62.

On or around March 29, 1996, petitioners sought rehearing from the Court of Appeals. That petition was denied. App. 198a. Of the sixteen active judges on the

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[7] Under the Fifth Circuit's Local Rule 34.7, "[o]ral arguments in all cases are tape recorded for the exclusive use of the Court."

Fifth Circuit that considered that petition, only one objected to the ruling denying intervention -- and that one judge's single, plaintive question (Pet. 9) hardly addressed any of the merits of either panel's opinion.

RELEVANT FACTS

Rather than focus on the facts relevant to their petition, petitioners try to deflect attention by presenting a long discussion of the facts relating to the merits of the *underlying* lawsuit. *See, e.g.*, Pet. 9-10. (They also criticize the decision of the Court of Appeals on the merits at great length, although that obviously has no bearing on their petition either. *E.g.*, Pet. 9-10 n.4; 19-20.) Suffice it to note that the history of admissions at UT Law School, and the admissions system applicable in 1992, are set forth in the opinion of the Court of Appeals (App. 3a-11a).

REASONS FOR DENYING THE WRIT

This Court requires "compelling reasons" and circuit splits on "important questions" before invoking its certiorari jurisdiction. The questions about Rule 24(a), Fed. R. Civ. P., and the "law of the case" doctrine that petitioners raise fail to meet these requirements. Moreover, (1) granting the petition would raise complex threshold questions involving this Court's jurisdiction and (2) this Court cannot resolve the ultimate question of whether petitioners should have been allowed to intervene without answering a host of other fact-bound questions that the courts below had no need to address. For all of these reasons, the petition should be denied.

A. This Court Lacks Jurisdiction Over The 1994 Judgment

A petition for a writ of certiorari in a civil action seeking review of a judgment must be filed within ninety days after the entry of that judgment. 28 U.S.C. § 2101(c); Sup. Ct. Rule 13.1. This time limit is jurisdictional and must be adhered to strictly. *Stone v. I.N.S.*, 115 S. Ct. 1537, 1549 (1995); *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

Although this Court can reach back and consider "interlocutory" decisions of the lower courts in the same case upon appeal from a later judgment, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), it will not consider previous decisions that are "final" decisions in a litigation. *E.g.*, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923) (first denial of certiorari was from a "final decree, and we are expressly denied power to review it after three months"). Accordingly, this Court has jurisdiction to consider that May 1994 judgment only if it was an "interlocutory" decree subject to the Court's power to review such decrees, and not a "final" decree.

This Court has never definitively stated whether an order denying a motion to intervene pursuant to Rule 24(a), Fed. R. Civ. P., is "interlocutory" for purposes of its ability to reach back and consider such orders. However, several Courts of Appeals have considered that question for purposes of *their* jurisdiction; and each of those courts has concluded that (1) such orders are "final" judgments and *must* be immediately appealed, and (2) they cannot review such orders upon appeal from a later order denying intervention or from the final judgment in the

lawsuit. *United States v. City of Oakland*, 958 F.2d 300, 302 (9th Cir. 1992) (although United States conceded that intervention as of right was warranted, court had no jurisdiction over order denying intervention where appeal was not taken until after final judgment on the merits); *United States Environmental Protection Agency v. City of Green Forest*, 921 F.2d 1394, 1401 (8th Cir. 1990) (where first intervention motion was denied on December 3, 1987, second intervention motion was denied on March 24, 1989, and notice of appeal was filed on April 20, 1989, court ruled that "we lack jurisdiction over the December 3, 1987 order denying intervention"); *United States v. Dallas County Commission, Dallas County, Alabama*, 850 F.2d 1433, 1442-43 (11th Cir. 1988) (Court had no jurisdiction over appeal of denial of motion to intervene under Rule 24(a) filed twenty months after denial of the motion by the district court).[8]

These courts unanimously have reached that conclusion despite the fact that the jurisdiction of the Courts of Appeals under 28 U.S.C. § 1291 permits them to "reach back" and consider interlocutory orders (which are "merged" into the final judgment), just as this Court's jurisdiction permits it to do. 11A Wright, Miller & Kane, *Federal Practice And Procedure*, § 2962 at 433 (1995) ("Upon an appeal from the final decree every interlocutory order affecting the rights of the parties is subject to review in the appellate court").

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[8] In a departure from the other Courts of Appeals, the Eleventh Circuit in *Dallas County* did state that it had jurisdiction over the denial of the intervention motion to the extent it was based upon Rule 24(b), Fed. R. Civ. P. The distinction is unimportant here because petitioners only seek review of the denial of their application under Rule 24(a). *See* Pet. i. App. 71a.

Both common sense and considerations of orderly judicial procedure suggest that this Court should follow a similar rule. A rule requiring this Court to consider earlier denials of motions to intervene would permit unsuccessful intervenors to circumvent the jurisdictional time periods set forth in 28 U.S.C. § 2101 by simply filing yet another motion in the district court (as petitioners did here), appealing the denial (as petitioners did here), losing in the Court of Appeals on the ground that nothing had changed since the previous motion to intervene and the previous unsuccessful appeal (as petitioners did here), and then seeking review in this Court two years after the initial Court of Appeals decision (as petitioners do now).

B. The Decision Of The Court Of Appeals On The "Law Of The Case" Doctrine Is Not Worthy Of Review

Because this Court has no jurisdiction over the May 1994 judgment of the Court of Appeals, the *only* question properly before this Court is whether the Court of Appeals, in March 1996, properly applied the "law of the case" doctrine to petitioners' second appeal. Although petitioners identify the proper application of this doctrine as their fourth "question presented," they do not mention this doctrine at all in the "Reasons For Granting The Writ" segment of their petition. Moreover, they attempt to "refute" the factual predicate of the Court's decision (that the earlier panel had already passed on petitioners' arguments) only in an *ipse dixit* footnote asserting that the Court was "patently wrong." Pet. 28 n.6. *See also* Pet i (arguments "patently were not decided").

Of course, even if petitioners were correct that the

Court of Appeals *had* misapplied the "law of the case" doctrine, that would hardly warrant this Court's attention. Petitioners point to no conflict among the circuits or other compelling reason to review this well-established doctrine.

In any event, the Court of Appeals applied the doctrine correctly. As petitioners themselves concede in describing their *first* application to intervene, at that time they "made clear their intention to raise questions about the discriminatory effect of the use of the Texas Index as an admissions sorting device" (Pet. 26). How they arrive at their conclusion that the Court of Appeals did not even *implicitly* pass upon that possible "separate defense" in the May 1994 judgment is less than clear. Conspicuously, Judge Wiener served on both panels, App. 2a, 94a, and fully endorsed the conclusion that the first panel had considered and rejected petitioners' "test invalidity" defense. App. 89a, n.25.

C. The "Standard" Under Which The Courts Below Evaluated "Inadequate Representation" Is Of No Consequence Because Petitioners Fail To Meet Their Burden Under Any Relevant Test

Assuming *arguendo* that this Court has jurisdiction to review the May 1994 judgment, the Rule 24(a) issues petitioners raise are unworthy of review by this Court.

Petitioners assert that there is a "circuit split" concerning the appropriate standard under which to judge whether a proposed intervenor's interests are "adequately represented" (one of the four elements under Rule 24(a)), and that this Court should grant certiorari to resolve that split. Pet. 17-19. In the first place, petitioners' "circuit

split" is contrived.[9] Even if it were not, petitioners ignore the fact that the district court *applied* the "minimal standard" that they now presumably ask this Court to adopt (App. 193a ("the presumption of adequate representation may be rebutted on a relatively minimal showing")) -- and they still lost. Petitioners assert that the district court "employed a standard more stringent than that articulated by this Court in *Trbovich*" (Pet. 26). Plainly, it did not. Petitioners simply do not like the outcome the district court reached by applying that standard.

Both courts below were correct, both times, under any standard. Petitioners could not (and cannot) meet any standard to show that the representation of the defendants was (and is) inadequate. At the end of the day, all petitioners ever demonstrated was that they had an unpersuasive argument that defendants would not use (first

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[9] Petitioners concede that the D.C. and Eighth Circuits follow the *parens patriae* rule; assuming for the sake of argument that those courts occasionally interpreted it "liberally" in one case or another, it hardly creates a circuit split on a question of law. Contrary to petitioners' claim, the Ninth Circuit also follows the *parens patriae* rule, *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1498-99 (9th Cir. 1995). The Tenth and Eleventh Circuit cases that petitioners cite did not squarely address the *parens patriae* issue, and petitioners feel obliged to cite non-existent footnotes to demonstrate their point in the Eleventh Circuit. Perhaps most disingenuously, they cite a First Circuit case discussing *another issue altogether* -- the standard determining whether a "significantly protectable" interest exists, a distinct requirement under Rule 24(a) -- to further bolster their so-called "circuit split."

motion) and did not use (second motion).[10] Rule 24(a) does not permit intervention simply because a party chooses not to adopt every argument a proposed intervenor wishes to raise. *E.g.*, *United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986) (gay and lesbian group did not show inadequate representation by local human rights commission where the commission "imprudently stipulated to facts that it should not have and . . . did not sufficiently challenge certain evidence proffered by the [federal] government"); *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) ("representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case" citing *United States v. Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973)). *Cf. Sam Fox Publishing Co. v. United States*, 366 U.S. 683,

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[10] Petitioners assert that "[o]ne need not presume animus" (Pet. 5 n.2) for defendants' failure to submit "test invalidity" evidence, and this is true. In general, LSAT/GPA indices are widely used (App. 130a) precisely because they are valid. In any event, the circuit courts repeatedly have held that the use of an invalid test *does not* justify subsequent race-conscious decision-making to "remedy" the use of the invalid test. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc) ("the city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list") quoting *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 290 (1993)); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1572 (11th Cir. 1994) ("Use of racial hiring quotas to mask the effects of discriminatory selection procedures places grievous burdens on blacks as well as whites"). Surely, given this uniform case law under the Fourteenth Amendment, it was hardly *irrational* for defendants to decline to adopt petitioners' quixotic argument.

689 (1961) (in denying application to intervene, court notes that "sound policy would strongly lead us to decline [proposed intervenors'] invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting"). Defendants' decision not to use petitioners' "psychometric evidence" is insufficient.

D. Determining That Petitioners Should Be Allowed To Intervene Would Require This Court To Resolve Numerous Fact-Specific Questions Not Passed Upon By The Lower Courts

Finally, this Court should deny certiorari because the courts below could have relied upon any of the other elements required under Rule 24(a) to deny petitioners' repeated motions to intervene. They did not base their rulings on those other grounds for the simple reason that, having determined that petitioners' interests (assuming they had any) were adequately represented by the defendants, there was no need to reach the other requirements of Rule 24(a).[11]

In general, the lower courts repeatedly have emphasized that the four-part standard under Rule 24(a)(2) is a flexible, practical standard that should attempt to meet the exigencies and specific facts of individual cases. *E.g.*, *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 (5th Cir. 1992) ("the inquiry under [Rule 24](a)(2) is a flexible one,

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[11] Petitioners assert that "[o]n no occasion" (Pet. 25) has a court held in this case that petitioners cannot meet the other three requirements for intervention. While technically true, this statement is somewhat misleading for the reason stated in the text.

which focuses on the particular facts and circumstances surrounding each application . . . [I]ntervention of right must be measured by a practical rather than technical yardstick" (internal quotation marks omitted)). As a consequence, many circuit courts review orders granting or denying intervention under an abuse of discretion standard. *E.g.*, *Building And Const. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("We review the district court's decision to deny intervention under an abuse of discretion standard"); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994) ("Because of the variety of factual circumstances that face a district court [deciding a motion to intervene], and the close proximity of that court to the case's nuances, it has the advantage of having a better 'sense' of the case than we do on appeal. For that reason intervention decisions are reviewed under an abuse of discretion standard"); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987) ("[I]ntervention controversies arise in many different contexts, and require the court to consider the pragmatic consequences of a decision to permit or deny intervention . . . . This same reasoning supports an abuse of discretion standard of review, which we now adopt."); *Caterino v. Barry*, 922 F.2d 37, 40 (1st Cir. 1990); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

To hold that petitioners should be allowed to intervene, this Court would have to decide issues related to the three requirements other than "inadequate representation," and without the benefit of any fact-finding or analysis from either lower court. (On the other hand, if this Court grants the petition solely to review whether petitioners proved "inadequate representation," it will not resolve the underlying issue of whether petitioners should

be allowed to intervene.) There were numerous fact-sensitive issues raised by petitioners' motions to intervene, and which would now have to be reviewed by this Court, among them:

1. Was petitioners' motion to intervene untimely given their decision to wait fifteen months after this case began -- and even ten weeks after the summary judgment issues were resolved -- before making a motion to intervene?

2. Is the district court's finding on the first motion that intervention would "increase cost" and "delay disposition" of the litigation relevant to any consideration of timeliness? *See* n.5, *supra*.

3. Is petitioners' failure to ask the district court to reconsider the initial denial of their motion in April 1994 fatal to their second attempt to intervene because the parties were obligated to submit final expert witness lists at that time and petitioners thus knew that defendants would not call petitioners' expert or any other expert who would testify concerning the validity of the Texas Index?

4. Is the fact that petitioners first tried to submit a "declaration of an expert witness" (Pet. 6) as *amici* before moving to intervene relevant to the timeliness of their second motion?

5. Do students applying to UT Law School have a "significantly protectable interest" in some particular admissions process? *See Donaldson v. United States*, 400 U.S. 517, 531 (1971) (holding that interest under Rule 24(a) had to be a "significantly protectable" interest, and ruling that taxpayer lacked such interest in an

action by the government seeking to enforce subpoenas served as part of an investigation of the taxpayer).

6. Since the Court of Appeals specifically noted that its decision could not be used to preclude an independent Title VI challenge to UT Law School's use of the Texas Index, are petitioners' interests (or those of its past, present, or future members) "impaired" by the judgment of the Court of Appeals?

7. Do petitioners *qua* groups have their own legal interests? Is it sufficient that they are simply "interested" in the outcome of the decision? *But cf. Sierra Club v. Morton*, 405 U.S. 727 (1972).

8. Assuming that petitioners can represent their members' interests, is it of consequence that there is nothing in the record to demonstrate that any identifiable member of petitioner BPLA had (much less still has) a specific interest in applying to and attending UT Law School? *See Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 203 (5th Cir. 1984), *aff'd in part, vacated in part, on other grounds*, 473 U.S. 432 (1985) (holding that the failure to identify an affected member defeats standing). *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (for standing purposes, possibility of injury cannot be remote).

None of these issues (and a number of related issues) were addressed, much less decided, below.

Although space considerations preclude complete answers to each of these complex questions, the issues of petitioners' "significantly protectable interests," and their ability to protect them, deserve some additional

elaboration. Plainly, UT Law School is not *obligated* to engage in any particular form of affirmative action under *United States v. Fordice*, 505 U.S. 717 (1992) both because (1) there is no relevant policy traceable to the *de jure* era before *Sweatt v. Painter*, 339 U.S. 629 (1950) (App. 58a & n.48, 112a-13a & n.8) and (2) *Fordice* would only obligate UT Law School to eliminate such policies. Thus, petitioners have no *legal* interest in the now-defunct system used in 1992. (If they did, some member presumably would have sued when it was abandoned.)

Moreover, even if (contrary to law) an "interest" could be demonstrated simply by showing that an applicant's *odds of being admitted* would be affected, petitioners' claim would still fall short.[12] Petitioners cannot say precisely how UT Law School will adjust its admissions procedure to the holding of the Court of Appeals that it cannot use race in its admissions process. Texas educators have, to date, demonstrated a remarkable

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[12] If that were the only criterion, of course, presumably the Jewish Pre-Law Students and the Chinese Pre-Law Students -- indeed, *any* individual undergraduate who might have expressed an intent to apply to UT Law School -- could have intervened on one side or the other. If individuals from one group's chances of being admitted are affected, so are individuals from all others. *Compare Cohn v. E.E.O.C.*, 569 F.2d 909, 911 (5th Cir. 1978) (in ruling that two employees whose promotions were vacated by the district court could intervene pursuant to Rule 24(a), the court stated that "[h]ad the applicants sought to intervene in [plaintiff's] original suit [prior to their promotions], the possible detriment to their likelihood of promotion that might have been wrought by the award to [plaintiff] of constructive service would not have constituted a sufficiently protectable interest to warrant intervention of right").

resilience in their efforts to assist minority students.[13] Law School may, for example, reduce its reliance on the Texas Index (App. 3a-4a) and consider other factors (*e.g.*, an applicant having worked his or her way through college) far more heavily. It may change the index to weigh GPA more heavily. The record does not state how this might affect minority admissions in general, much less any specific applicant who happened to be a member of BPLA.

One of petitioners' own cases, *Ass'n Against Discrimination In Employment v. Bridgeport*, 594 F.2d 306 (2d Cir. 1979) (Pet. 24) perhaps best illustrates this point. Petitioners cite it for the proposition that a state employer can engage in race-conscious hiring to "remedy" an invalid test, but the case has no such holding. Rather, the Court remanded to determine whether a lower cut-off score on the test would eliminate any disparate impact. *Id.* at 313 & n.19. (The absence of a disparate impact, of course, eliminates any claim under Title VI or Title VII, regardless of the underlying validity of the criteria.) So, too, UT Law School here may arrive at a similar system, which relies less on the Texas Index, and which eliminates

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[13] Prior to the Court of Appeals granting defendants a stay of mandate, defendants redesigned their race-based scholarships (which they deemed affected by the decision on the merits) to focus on the "educationally disadvantaged." *See, e.g.*, Carlos Sanchez, *College Aid Plan Revived By Board*, Fort Worth Star Telegram, April 19, 1996, at 19, 22 (Higher Education Commissioner Kenneth Ashworth states that "educationally disadvantaged" will "cover many of the students who currently qualify for minority scholarships"; "'Sometimes there is more than one way to reach an objective,' said board member Juan Hinojosa").

any disparate impact.[14] If it chooses "strict use of the Texas Index" (Pet. 26), then petitioners (or, more accurately, those actually seeking to apply to UT Law School) can attack the validity of that criterion in a separate lawsuit.[15]

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[14] In fact, UT Law School could have eliminated any disparate impact by using the Texas Index as a cut-off point instead of a decisive factor. For example, the evidence at trial demonstrates that, among 1992 resident Texan applicants with TI scores above 180 (the low end of the "discretionary" scale for African-Americans and Mexican-Americans (App. 8a)), approximately 20% were minorities. Resident minority applicants constituted approximately 21% of those offered admission under UT Law School's racially-discriminatory system. Trial Ex. P-139. Consequently, using the TI as a cut-off, UT Law School could have admitted roughly the same percentage of minorities among its resident applicants -- *without* discriminating.

Of course, the very existence of race-neutral alternatives to defendants' race-conscious system demonstrates that it was not narrowly-tailored -- regardless of what one considers a "compelling interest." *Cf. Ass'n Against Discrimination v. Bridgeport*, 594 F.2d at 313 (possibility of eliminating disparate impact by lowering score "affects not only the remedy ordered by the [district court] judge, but also the basic finding of liability").

[15] Petitioners' "Gordian knot" footnote -- suggesting the dreary possibility of an endless cycle of lawsuits with "no reasonable end in sight" (Pet. 29 n.7) -- again misses the point. While there may be retrospective or remedial orders of various kinds in the unlikely event that petitioners could demonstrate the invalidity of a LSAT/GPA index, the only prospective remedy would be elimination of the invalid criterion. If it is replaced with a valid criterion, it is unclear who could complain.

CONCLUSION

The petition should be denied.

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Respectfully submitted,

Michael E. Rosman
CENTER FOR INDIVIDUAL RIGHTS
1300 19th St., NW, Suite 260
Washington, D.C. 20036

Counsel For Respondents Hopwood
And Carvell